

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
POINT RELIED ON.....	3
I.....	3
ARGUMENT.....	4
I.....	4
CONCLUSION	8
CERTIFICATE OF SERVICE	8
CERTIFICATION: SPECIAL RULE NO. 1(C)	9

TABLE OF AUTHORITIES

Cases

<i>In re Caranchini</i> , 956 S.W.2d 910 (Mo. banc 1997), <u>cert. denied</u> , 524 U.S. 940,	3, 5
<i>Subway Restaurants, Inc. v. Kessler</i> , 266 Kan. 433, 970 P.2d 526, 535 (1998).....	3, 5
<i>Wolfe v. Central Mine Equipment Company</i> , 895 S.W.2d 83, 88 (Mo. App, E.D.	3, 5

Other Authorities

K.S.A. 60-2007(b)(repealed 1997).....	3, 4
---------------------------------------	------

Rules

Rule 4-3.1	3
Rule 4-8.4(c).....	3

POINT RELIED ON

I.

**THE SUPREME COURT SHOULD PUBLICLY REPRIMAND
RESPONDENT BECAUSE THE ULTIMATE FINDINGS OF THE
KANSAS COURTS AND THE RECORD CREATED IN THIS
DISCIPLINARY CASE PROVIDE THE BASIS FOR CONCLUDING
THAT RESPONDENT VIOLATED RULES 4-3.1 AND 4-8.4(C) IN
THAT RESPONDENT ACTED IN BAD FAITH BY PROPOUNDING
MISLEADING EVIDENCE IN THE KANSAS LITIGATION.**

Wolfe v. Central Mine Equipment Company, 895 S.W.2d 83 (Mo. App, E.D.

1995)

In re Caranchini, 956 S.W.2d 910 (Mo. banc 1997), cert. denied, 524 U.S. 940,

118 S.Ct. 2347, 141 L.Ed.2d 717

Subway Restaurants, Inc. v. Kessler, 266 Kan. 433, 970 P.2d 526 (1998)

Rule 4-3.1

Rule 4-8.4(c)

K.S.A. 60-2007(b)(repealed 1997)

ARGUMENT

I.

THE SUPREME COURT SHOULD PUBLICLY REPRIMAND RESPONDENT BECAUSE THE ULTIMATE FINDINGS OF THE KANSAS COURTS AND THE RECORD CREATED IN THIS DISCIPLINARY CASE PROVIDE THE BASIS FOR CONCLUDING THAT RESPONDENT VIOLATED RULES 4-3.1 AND 4-8.4(C) IN THAT RESPONDENT ACTED IN BAD FAITH BY PROPOUNDING MISLEADING EVIDENCE IN THE KANSAS LITIGATION.

Informant will reply to Respondent's Brief under Point I, as in Informant's judgment the issues raised by Respondent in his brief are encompassed under Informant's Point I.

Respondent contends that this Court must find that the 1989 amended partnership return was "false" before discipline can be imposed. He follows that argument with a subject matter jurisdiction objection to the Kansas courts' authority to rule on the falsity of a federal tax return.

Respondent was assessed additional costs under the authority of K.S.A. 60-2007(b)(repealed 1997). The assessment of additional costs pursuant to that law required the court to find that there was substantial competent evidence that Respondent "knowingly and not in good faith" asserted a defense or denied the truth of a factual statement in a pleading or during discovery without a reasonable basis in fact and not in

good faith. It was not necessary to imposition of the additional costs for the court to find that Respondent created a false tax return. Such a finding might have been necessary had Respondent been a Kansas licensed attorney and had the court been examining Respondent's conduct under its Rule 226, Kansas Rules of Professional Conduct 3.3(a)(1)(4), which it explicitly was not. *Subway Restaurants, Inc. v. Kessler*, 266 Kan. 433, 970 P.2d 526, 535 (1998). If Informant believed the record would support a finding that Respondent deliberately created false evidence, Informant would be recommending a sanction more serious than the one recommended in its brief, a public reprimand.

Issue preclusion estops a party from "relitigating factual or legal issues which were decided and necessary to a prior judgment." *Wolfe v. Central Mine Equipment Company*, 895 S.W.2d 83, 88 (Mo. App, E.D. 1995). It was essential to imposition of his opponent's costs of litigation on Respondent for the Kansas Supreme Court to find that Respondent asserted a defense or denied the truth of a statement in a pleading or in discovery without a reasonable basis in fact and not in good faith. Those issues have been fully litigated and decided adversely to Respondent. Those findings establish by a preponderance of the evidence that Respondent violated Rules 4-3.1 (meritorious claims and contentions) and 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). See *In re Caranchini*, 956 S.W.2d 910 (Mo. banc 1997), cert. denied, 524 U.S. 940, 118 S.Ct. 2347, 141 L.Ed.2d 717.

The Kansas case was not a tax case. The Kansas Supreme Court certainly had subject matter jurisdiction over K.S.A. 60-2007 (repealed 1997). The factual and legal findings essential to that case properly form the basis for a Missouri discipline case.

Because it was not a tax case, and because neither the issue of the validity of the amended partnership return under the tax code, nor the professional propriety of the accountant's conduct in its preparation, were essential or necessary to the Kansas court's decision, the Missouri Board of Accountancy's closing of the case against accountant Seiffert is a red herring and should have no bearing on the Court's analysis in this case.

Respondent complains, again, that he was denied a fair hearing in Kansas because the trial judge who heard the case for additional costs had an ex parte discussion with a non-involved lawyer about Respondent's clients and several of the attorneys in the case. Respondent briefed and argued this issue both to the trial judge assigned the case after the original judge recused herself and the Kansas Supreme Court. 970 P.2d at 531-533. The issue was examined in detail by the Kansas Supreme Court and, like so many other issues in this case, decided contrary to Respondent's position. Respondent was provided a full and fair opportunity to litigate his non-liability under K.S.A. 60-2007(b). Judge Russell's ex parte discussion of collateral matters did not deny Respondent his right to do so.

Informant pled violations of both Rules 4-3.1 and 4-8.4(c) in the Information that initiated this case. Respondent's good faith was directly at issue throughout the Kansas sanctions case. The issues briefed by Informant are no surprise to Respondent. Informant's counsel at hearing before the Disciplinary Hearing Panel never argued that the case turned on the "falsity" of the amended return. Rather, it was Respondent who, at great length, developed the evidentiary case for the legality of the tax return and the propriety of the conduct of its preparer. The fact that Informant continues not to embrace those issues as the basis for the disciplinary case is no reason to adopt Respondent's

argument that he is “surprised” by the issues briefed and requires an opportunity to address them. Respondent had the opportunity to address the pled issues both at hearing and in his brief, but chose to continue focusing his efforts on collateral issues.

It is true that Informant has not briefed the allegations pled in the Information that Respondent violated Rules 4-3.3, 4-3.4, and 4-4.1. The fact that Informant has not pursued those claims should be cause for cheer to Respondent, not reason to appoint a Special Master for further proceedings or to absolve Respondent of any misconduct.

Finally, Respondent’s opposing counsel’s motivation in pursuing his client’s litigation costs against Respondent is not at issue. cursory review of the sad and lengthy record underlying this case reveals a relationship between Respondent and Mr. Dunham that is the antithesis of professionalism. That said, the findings of the Kansas Supreme Court stand as an indictment of Respondent’s conduct, which very definitely is at issue in this case.

CONCLUSION

The findings essential to the Kansas Supreme Court's decision in *Subway Restaurants, Inc. v. Kessler*, 266 Kan. 433, 970 P.2d 526 (1998), established by a preponderance of evidence that Respondent violated Rules 4-3.1 and 4-8.4(c). Respondent should be publicly reprimanded for his professional misconduct.

Respectfully submitted,

OFFICE OF
CHIEF DISCIPLINARY COUNSEL

By: _____
Sharon K. Weedin #30526
Staff Counsel
3335 American Avenue
Jefferson City, MO 65109
(573) 635-7400

ATTORNEYS FOR INFORMANT

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2001, two copies of

Informant's Reply Brief have been sent via First Class mail to:

Mr. David Duree
Attorney at Law
PO Box 771638
St. Louis, MO 63177-1638

Sharon K. Weedin

CERTIFICATION: SPECIAL RULE NO. 1(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Special Rule No. 1(b);
3. Contains 1,410 words, according to Microsoft Word 97, which is the word processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Sharon K. Weedon